3361

NO. 19272

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BURNERDEAN YOUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

JURISDICTIONAL STATEMENT

On July 10, 1963, an indictment was filed against appellant Burnerdean Young and co-defendant John Henry Mason, in which the Federal Grand Jury for the Southern District of California, Central Division, charged each of them in one count with violation of Title 18, United States Code, Sections 2113(a) and (d) [C. T. 2]. 1/ The indictment charged that appellant and his co-defendant, by force and violence and by intimidation, knowingly and wilfully took from tellers John E. Finegan and Shirely Ratliff $5,922.50 belonging to, and in the care, custody, control, management and

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1/ "C. T." refers to Clerk's Transcript of Proceedings.

possession of Great Western Savings and Loan Association, 947 West Manchester Blvd., Los Angeles, Calif., a savings and loan association whose accounts were insured by the Federal Savings and Loan Insurance Company. The indictment further charged that in the commission of the offense each defendant assaulted and put in jeopardy the lives of said Finegan and Ratliff by the use of a dangerous weapon and device, namely, a revolver, in violation of Title 18, United States Code, Section 2113(d).

On July 15, 1963, both defendants pleaded not guilty to the charge [C. T. 4]. Trial by jury commenced September 24, 1963 [C. T. 8] and on October 1, 1963, both defendants were found guilty of violating §2113(a), the lesser included offense [C. T. 14]. On October 21, 1963, appellant's motion for a new trial was denied and he and co-defendant Mason were each sentenced to 15 years imprisonment [C. T. 18].

Jurisdiction of the District Court was based on Title 18, United States Code, Sections 2113(a) and (d) and 3231. This Court has jurisdiction to review the judgment of the District Court under Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

The one-count indictment is based upon Title 18, United States Code, Sections 2113(a) and (d) which provides in pertinent part as follows:

"Bank robbery and incidental crimes.

(a) Whoever, by force and violence, or by intimidation, takes, ... from the person or presence of another, any money ... belonging to, or in the care, custody, control, management, or possession of any ... savings and loan association ... Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

* * *

"(d) Whoever, in committing ... any offense defined in subsections (a) or (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000, or imprisoned not more than twenty-five years, or both.

* * * "

III

STATEMENT OF FACTS AND TRIAL PROCEEDINGS

The details of the robbery in which appellant and his co-defendant were involved were elicited from four eye-witnesses: John E. Finegan, Shirley Ratliff, Marie Williams and Jean Rygarrd, all of whom were employees of the victim institution. The substance of their testimony is as follows:

Appellant and Mason together entered a branch of the Great Western Savings and Loan Association, 947 West Manchester Blvd., Los Angeles, California, between 9:15 and 9:20 a.m. on May 14, 1963 [R. T. 18, 21, 40, 164, 211]. 2/ It was stipulated that this branch of the Association was federally insured [R. T. 11]. Finegan, the chief teller, met them at his window and the three men had a brief conversation about personal loans [R. T. 21, 36, 38, 165, 172, 211]. During this conversation appellant pulled out a revolver, lowered it to the counter [R. T. 22-23], and pointed it at Finegan [R. T. 25, 27]. Appellant told Finegan to "take it easy" and "just stand there" [R. T. 23].

Appellant then walked around a planter box which separated the customers' lobby from the employees' work area while Mason stood near the teller's window. Appellant accosted Shirley Ratliff [R. T. 23-24, 100, 132, 138-139, 165, 211], and ordered

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2/ "R. T." refers to Reporter's Transcript of Proceedings.

her to open her cash drawer. She went to her teller's window and did as she had been told [R. T. 101, 140]. Appellant stepped away, returned with a white cloth bag, and ordered Ratliff to put the money from the drawer into the bag; she complied with the order [R. T. 101, 142, 212].

During this time Mason, who himself had partially displayed a gun, ordered Finegan to give to him the money in Finegan's cash drawer [R. T. 23, 24, 43, 55]. Finegan complied.

After obtaining the money from Ratliff's drawer, appellant told Finegan to open the vault. After the vault was opened, at appellant's direction, Finegan picked up a deposit bag containing checks and currency and gave it to appellant [R. T. 24, 54, 91]. Appellant then ordered Finegan and Rygaard to open other drawers. They did as directed although nothing was taken from the drawers [R. T. 101, 103].

Appellant next moved to Finegan's desk, uttered a complaint about the amount of money he had obtained, set down the deposit bag, and uncocked his weapon [R. T. 25, 74, 166, 212]. Following Mason's statement that he and appellant had "better go", appellant returned his gun to his clothing and walked around the planter to the lobby, where he joined Mason [R. T. 25-26, 166, 212].

While appellant was in the work area, he had kept his gun pointed downwards at his side [R. T. 100, 136, 178, 214]. However, Ratliff testified that she was "scared" [R. T. 136], as did Finegan, referring to the time when the gun had been pointed at

him [R. T. 33].

The two robbers then cautioned the employees against moving or calling the police and walked out the front door, turning left (east) on Manchester Blvd. [R. T. 26, 103, 166, 212]. Their departure occurred at approximately 9:30 a.m., they having been in the Association branch about 10 to 15 minutes [R. T. 35, 83, 226]. Their proceeds from the robbery totalled $5,920.40 [R. T. 13-14].

The four eyewitnesses subsequently identified appellant as one of the robbers by photographs [R. T. 84-89, 155-156, 188, 379], in a lineup [R. T. 89, 151-152, 188, 378-379], and in court at the trial [inter alia, R. T. 18, 28, 77, 92, 100, 106, 164, 169, 200, 211].

Additional facts were brought out by other Government witnesses. Erma Jean Bennett, manager of an apartment house at 1001 West 23rd St., Los Angeles, testified that appellant had rented a certain apartment, number 209, from her May 21, 1963, for which he had paid $72 from a quantity of cash in his possession. On direct examination the witness went on to describe appellant's "wife" who lived with him at the apartment, and when she stated that it was a "blonde", the court forbade further testimony on the point. Government counsel asked the witness whether she had ever seen Mason in the presence of appellant (no particular time being specified in the question). An objection by counsel for Mason on the grounds of incompetency, irrelevancy, and immateriality, was sustained. Counsel for

appellant then asked the witness, on cross-examination, about the physical features of the apartment. On re-direct examination, Government counsel asked whether Mason had attempted to rent an apartment, apparently on the same day as did appellant. After an affirmative response, the witness was then asked if Mason had been with appellant at that time, and the witness answered "Yes". Counsel for Mason asked that the testimony elicited on redirect be stricken, but the court denied the motion stating "I will reserve the motion to strike all the testimony." [R. T. 258-261]. The court in fact said nothing further on the motion during the trial.

Ernest Lindo, an automobile salesman for Brand Motors, Los Angeles, testified that he had sold a 1954 Lincoln to appellant for $470 cash on the afternoon of May 14, 1963. The car was registered in the name of appellant's sister, Bernice Young, by appellant [R. T. 271-273].

Testimony was also introduced concerning defendant Mason's purchase of a horse on or about May 20, 1963 [R. T. 265-269] and that Mason had made substantial bank deposits after the robbery [R. T. 288-303]. Los Angeles Police officers testified that they had found a certain .32 calibre revolver, previously identified as similar to that used by appellant in the robbery, in a refrigerator of a house where Mason had apparently hidden it [R. T. 304-346, 28-29, 33, 104, 133].

Edward A. Plevack, Special Agent, Federal Bureau of Investigation, testified that he had interrogated appellant on

June 12, 1963, and that appellant had stated that he had rented the 23rd St. apartment; that he had not bought the Lincoln but that his sister had done so, with her money; and that he could not account for his whereabouts on the day of the robbery [R. T. 349-350, 377]. At this point counsel for appellant objected to the line of questioning on the grounds of irrelevancy and immateriality. In overruling this objection the court stated that "It may be going to the credibility of the witness who hasn't yet testified." [R. T. 350].

Agent Plevack further testified that he had obtained a search warrant and had searched the 23rd St. apartment and found a .32 auto matic pistol and a sales slip apparently dated May 20, 1963 in the amount of $69 for a Polaroid camera [R. T. 354-355, 263, 386]. After this search, on June 14, 1963, Agent Plevack again spoke to appellant, who stated that he had been horseback riding at "The Griffith Park Stables" on Los Feliz Blvd. on the day of the robbery and that he had used a false name at the time. Appellant also told Agent Plevack that he had been unemployed since April 8, 1963 [R. T. 355-356] and that the only money he got was from his sister and brother [R. T. 384].

Evidence was admitted that there was no such stable as named by appellant on Los Feliz Blvd. [R. T. 363].

When appellant took the stand to testify on his own behalf, he revealed during his direct examination that he had twice been convicted of a felony [R. T. 482]. On subsequent cross-

examination he revealed yet another such conviction [R. T. 492].

Appellant gave an account of his activities on May 14 in minute detail, claiming to have been at his sister's residence at the time the robbery was committed [R. T. 484]. He denied complicity in the robbery and also denied having ever said that he had been riding. He did admit, however, having bought the Lincoln and the Polaroid camera with money won at gambling [R. T. 492, 494]. He testified that he had used his sister's name in buying the car because of possible objections to the purchase by his parole officer [R. T. 495-496]. Bernice Young, appellant's sister also testified in support of appellant's "alibi", by stating that appellant had been at her house at the time of the robbery [R. T. 500]. On cross-examination she admitted that she had previously told Agent Plevack that she, and not appellant, had bought the Lincoln [R. T. 502]. In further impeachment of Bernice Young's testimony, Agent Plevack testified that during a conversation with her on June 13, 1963 Miss Young had been unable to establish appellant's whereabouts at the time of the robbery [R. T. 521-522].

It should be noted that a major part of co-defendant Mason's defense, both in cross-examination of Government witnesses and in his case in chief, was an attempt to establish that on September 6, 1963, when Mason reentered the branch office and confronted the savings and loan employees, they did not identify him as the bandit. [R. T. 111, 113, 125-127, 218-

219, 407-415, 418-242, 454-457]. Counsel for Mason also brought out the innocuous fact that Shirley Ratliff, a government witness, had consulted with Agent Plevack during a recess as to whether she had previously reported to Plevack that she had noticed Mason's gold teeth during the robbery [R. T. 159, 476, 478, 511].

The court withdrew from the jury's consideration to question whether there had been an assault with a dangerous weapon, i.e., whether sub-section (d) of section 2113 had been violated as well as subsection (a) [R. T. 246-248, 398, 532].

During its instructions to the jury, the court made the following comment on the evidence:

> "I don't think there should be any question, at least there is no question in my mind, that there was intent to rob ... the building and loan association. There was an intent to do that. There may be a question whether or not the taking was by intimidation. But in my opinion there is sufficient evidence to sustain a finding it was by intimidation." [R. T. 555].

This statement was interposed between instructions that the jury was the sole judge of the facts and followed by instructions giving a correct legal definition of "intimidation" and stating that a judge's comments on the facts may be entirely disregarded [R. T. 540, 549, 553, 556].

In further comment on the evidence, the court mentioned

that the defendants were "Negroes and black" as a physical fact to be considered when determining whether they had been correctly and truthfully identified as the bandits [R. T. 556].

No objections to any of the court's comments or instructions were made by appellant's counsel although he was given an opportunity to do so [R. T. 556].

After the jury had deliberated approximately 4-1/2 hours without arriving at a verdict, the court gave them almost verbatim the "Allen Instruction" as found in 27 F. R. D. 39, No. 8.19 [R. T. 564-567]. No objection was made by counsel. Approximately 5 hours later a verdict of guilty was returned as to both Mason and appellant.

IV

APPELLANT'S SPECIFICATIONS OF ERROR

Appellant has presented eleven specifications of alleged error which in substance are the following:

1. The trial judge's comments on the evidence took the issue of intimidation, an essential element of the offense charged, from the jury in violation of appellant's right to a jury trial.

2. There was insufficient evidence of force and violence to sustain a conviction "under the indictment filed".

3. The defense was prejudiced by the manner in which the indictment was drawn.

4. The trial court erred in denying defendant's motion to exclude witnesses.

5. Admission by the court of testimony of Agent Plevack, concerning his interviews with appellant, was prejudicial because

a) The testimony was incompetent, irrelevant, and immaterial;

b) The testimony amounted to prior impeachment of a witness who had not yet testified;

c) The testimony "compelled" appellant to take the witness stand.

6. The trial court erred prejudicially in admitting evidence about money expended by appellant subsequent to the date of the crime since such evidence was incompetent, irrelevant and immaterial.

7. The trial court erred prejudicially in failing to strike certain testimony of Erma Jean Bennett given on redirect examination since the testimony concerned new matter "totally" unconnected with the subject to which cross-examination related.

8. There was an "improper" consultation of an F. B. I. agent by a prosecution witness during the trial

9. There were "prejudicial and inflammatory" remarks during the trial which deprived appellant of a fair trial.

10. Supplemental instructions given by the court had the effect of "pressuring" a minority of jurors to reach agreement with the majority, thereby prejudicing appellant's "right

to a hung jury and a mistrial".

11. The cumulative effect of the above "errors" resulted in a miscarriage of justice.

ARGUMENT

A. THE TRIAL COURT DID NOT TAKE THE ISSUE OF INTIMIDATION FROM THE JURY; ITS REMARKS WERE BUT A COMMENT ON THE EVIDENCE.

It is true, as appellant contends, that a trial judge in a Federal court may not take a material fact from the jury's determination, but it has long been the law that the judge may comment upon the evidence so long as it is made clear that the ultimate determination of fact is up to the jury.

Holm v. United States, 325 F. 2d 44, 45-46 (9 Cir. 1963);

Smith v. United States, 305 F.2d 197, 205 (9 Cir. 1962);

Duke v. United States, 255 F. 2d 721, 728 (9 Cir. 1958);

Shaw v. United States, 244 F. 2d 930, 939 (9 Cir. 1957);

Frederick v. United States, 163 F. 2d 536, 547-548 (9 Cir. 1947);

Beckstead v. United States, 272 F. 2d 571, 573

(10 Cir. 1959);

Stoneking v. United States, 232 F. 2d 385, 387-391 (8 Cir. 1956) cert. den. 352 U.S. 835 (1956).

See also 9 Wigmore, Evidence, §2551 (3rd ed. 1940), for an articulate and convincing argument against any emasculation or abrogation of this doctrine.

It is also well established that the meaning and effect of the court's comments and instructions to the jury will be determined by viewing the charge in its entirety rather than by isolating any particular statement out of context, and it will be presumed that the jury followed the court's entire instruction in their deliberations.

United States v. Beck, 298 F. 2d 622, 635 (9 Cir. 1962);

Beckstead v. United States, supra, 573;

Stoneking v. United States, supra, 389.

Thus, the statement made by the court which is cited by appellant (and quoted in Appellee's Statement of the Facts, supra) must be considered with other statements made by the court on the subject of "intimidation" as well as those made on the proper functions of the judge and jury. To quote some examples from the record:

"... you as jurors are the sole judges of the facts" [R. T. 540].

"The law of the United States permits the judge to

comment to the jury on the evidence in the case. Such comments are only expressions of the judge's opinion as to the facts, and the jury may disregard them entirely, since the jurors are the sole judges of the facts." [R. T. 549]

"I want to impress upon you that you are the sole judges of the facts." [R. T. 556]

Appellant has now, for the first time, chosen to attack a single segment of the court's remarks, to wit:

" . . . There may be a question whether or not the taking was by intimidation. But in my opinion there is sufficient evidence to sustain a finding it was by intimidation." [R. T. 555]

When this relatively equivocal comment is placed in context with the other instructions, one can hardly presume that the issue of intimidation has been withdrawn from the jury's deliberations.

In Beckstead, supra, the Court of Appeals for the Tenth Circuit was presented with an almost identical question. It was held proper for the judge to say in a Dyer Act prosecution:

"There is substantial evidence from which you could find that there was an aiding and abetting [an essential element of the offense]."

In Shaw, supra, this Court upheld the action of a trial judge who assumed, in his instructions, that an essential element of the crime charged had been proven when the evidence on that element was conclusive. And in the instant case, as is obvious from the record,the evidence of intimidation was certainly conclusive, a point tacitly admitted by appellant.

All of the cases cited by appellant on this point present a much different situation. Either they concern a forthright unequivocal determination of a fact in issue by the judge stated as "I charge you as a matter of law":

Brooks v. United States, 240 F. 2d 905, 906 (5 Cir. 1957);

Sullivan v. United States, 178 F. 2d 723, 724 (D. C. Cir. 1949);

United States v. Gollin, 166 F. 2d 123, 125 (3 Cir. 1948)

or in the nature of: "You are to determine only one thing":

United States v. McKenzie, 301 F. 2d 880, 881 (6 Cir. 1962);

Schwachter v. United States, 237 F. 2d 640, 643 (6 Cir. 1956);

Manuszak v. United States, 234 F. 2d 421, 424 (3 Cir. 1956);

United States v. Raub, 177 F. 2d 312, 315-36 (7 Cir. 1949);

or a charge by the judge that simply misstates or omits a vital

point of law:

Bollenbach v. United States, 326 U.S. 607 (1946);

United Brotherhood v. United States, 330 U.S. 395 (1946)

In no case cited by appellant was the language or action of the trial judge as patently innocuous as in the instant case.

In any event, there being no "plain error" this Court should not consider this belated attack on the trial court's comments and instructions since no objection or exception was made at the trial.

Rule 30, 52(b), Federal Rules of Criminal Procedure, Title 18, U.S.C.

Phillips v. United States, 334 F.2d 589, 590 (9 Cir. 1964);

Herzog v. United States, 226 F.2d 561, 567-70 (9 Cir. 1955), cert. den. 352 U.S. 844 (1956)

B. THERE WAS SUFFICIENT EVIDENCE OF FORCE AND VIOLENCE TO SUSTAIN THE CONVICTION

Although the Government is not required to prove the existence of "force and violence" so long as "intimidation is shown", United States v. Baker, 129 F.Supp. 684, 686 (S.D. Cal. 1955), there was in fact sufficient evidence of "force and violence" in the pointing and display of a pistol by appellant to establish an assault [R.T. 22-27]. Had the court not withdrawn

the question from the jury, relative to the putting of lives in jeopardy by the use of a dangerous weapon, appellant could well have been convicted of the aggravated offense of armed bank robbery under subsection (d) of section 2113, Title 18, U. S. C.

Wagner v. United States, 264 F. 2d 524, 530 (9 Cir. 1959);

Wheeler v. United States, 317 F. 2d 615, 618 (8 Cir. 1963);

United States v. Gebhardt, 90 F. Supp. 509, 513 (D. Neb. 1950).

In Wagner, this court stated:

"Had [the victim] cried out, grappled with his assailant, sought to escape, or refused to hand over the money - or had his assailant mistakenly thought he was offering resistence - [the victim's] life would probably have been forfeited.

We hold that the jury was warranted in finding that the use of the gun in this manner placed [the victim's] life in an objective state of danger, and so jeopardized his life within the meaning of the statutes."

There is ample reason to believe that such dire results would have occurred if Mr. Finegan or Mrs. Ratliff had offered resistance. Indeed, it was surely the threat of such force and violence that led them to comply with appellant's demands. The fact that most of the time appellant kept his gun at his side leads to the inference

that he wanted to keep passers-by from noticing that a robbery was in progress; it does not indicate that he would not have used the gun if he felt it to be necessary.

C. THE INDICTMENT WAS PROPERLY DRAWN

The pleading in the conjunctive of several alternative ways of committing a crime, followed by proof in the disjunctive of any of such alternatives, has always been held proper.

Turf Center, Inc. v. United States,
325 F. 2d 793, 796 (9 Cir. 1963);
Heflin v. United States, 223 F. 2d 371, 373
(5 Cir. 1955);
42 C. J. S., Indictments and Informations, §101,
note 68.

It is the contention of appellant that because of the wording of the indictment, his trial counsel was "lulled into a false sense of security". Such a purported mistake of judgment by counsel, unless carried so far that appellant could be deemed to have been deprived of reasonably effective legal assistance, has been held to be non-prejudicial.

Brubaker v. Dickson, 310 F. 2d 30, 37 (9 Cir.
1962) cert. den 372 U. S. 978 (1962)

Furthermore, there is no showing or affidavit to the effect that counsel at the trial (who does not represent appellant on appeal)

was in fact suffering from such mental lassitude or that he otherwise did not fully understand the clear charge of the indictment.

D. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO EXCLUDE WITNESSES

The decision whether or not to invoke the so-called "exclusionary rule", whereby witnesses are excluded from the trial except when testifying, is solely within the discretion of the trial court; and every case cited by appellant on that issue reiterates the doctrine. In fact, appellee can find only one case in the federal reports, Charles v. United States, 215 F. 2d 825, 827 (9 Cir. 1954), where the action of a trial court in refusing to exclude witnesses has been held to be error. In that decision it was apparent that the trial judge had not exercised any discretion in the matter, but had denied the motion to exclude in the erroneous belief that witnesses could not be excluded as a matter of law.

In the instant case the trial court stated that witnesses would be excluded if a "very good reason" were presented. Counsel for Mason expressed vague fears that witnesses would be adversely affected by the power of suggestion. This reason was not satisfactory to the court and the motion to exclude was denied [R. T. 8-9]. It is obvious that the court consciously

exercised its discretion. Furthermore, there is no showing that the witnesses, nearly all of whom were subjected to rigorous cross-examination, had altered or perjured their testimony by reason of having been in the courtroom at various times during the trial.

Under the circumstances of this case there is every reason to treat the matter as did this Court in Williamson v. United States, 310 F.2d 192, 198 (9 Cir. 1962) as it upheld the trial court's refusal to exclude witnesses:

> "The practice of excluding witnesses from the courtroom except while each is testifying is to be strongly recommended ... It is nonetheless the uniform federal rule, prevailing also in a majority of the states, that a motion to sequester is addressed to the discretion of the trial court."

The trial judge's exercise of that discretion reveals no basis for concluding that its decision was other than sound and proper judgment.

E. THE TESTIMONY OF AGENT PLEVACK CONCERNING THE SUBSTANCE OF HIS INTERVIEWS WITH APPELLANT WAS CLEARLY PROPER BECAUSE APPELLANT'S STATEMENTS WERE EITHER ADMISSIONS, AND, AS SUCH, EXCEPTIONS TO THE HEARSAY RULE, OR NON-PREJUDICIAL MATTER.

Statements made by a defendant upon being informed that a crime has been committed, or upon being confronted with a criminal charge, may be considered by the jury in the light of the other evidence in the case. Such statements, usually categorized as "admissions of defendant" or "declarations against interest", come in as an exception to the general rule against production of hearsay evidence. The doctrine most clearly applies to incriminating statements or exculpatory statements later proved to be false.

Opper v. United States, 348 U. S. 84, 89-93 (1954);

Gonzales v. Landon, 215 F. 2d 955, 957 (9 Cir. 1954);

Fogarty v. United States, 263 F. 2d 201 (5 Cir. 1959) cert. den. 360 U. S. 919 (1959).

Under the rule as stated, and regardless of how they may have been characterized by the trial court, the statements made by appellant to Agent Plevack were properly received into evidence. Appellant told Plevack in their first confrontation that he (appellant) could not account for his whereabouts on the day of the robbery, that he did not purchase the 1954 Lincoln, and that he had rented

the apartment on 23rd St. for his girl friend although he himself lived elsewhere [R. T. 349-350, 377]. Appellant later changed his story and told Agent Plevack that he could account for his whereabouts on the robbery date, i. e. that he had been riding at the "Griffith Park Stables" and in so doing had used the fictitious name "Joseph Hall". He also stated that he had been unemployed since April 8, 1963, and that his only source of money was his brother and sister [R. T. 355-356, 384].

The probable falsity and incriminatory effect of these statements, when compared with each other and with the testimony of other witnesses, clearly brings his admissions under the stated exception to the hearsay rule.

Even the admission of pure hearsay has been upheld when the matter thus brought in is harmless.

Rule 52(b) of Federal Rules of Criminal Procedure, Title 18, U. S. C. A.;

United States v. Cianchetti, 315 F. 2d 584 (2 Cir. 1963);

Harlow v. United States, 301 F. 2d 361, 375 (5 Cir. 1962) cert. den. 371 U. S. 814

Insofar as all of appellant's out-of-court statements can be considered "admissions", they are clearly competent evidence properly produced; insofar as they are not "admissions" they constitute harmless hearsay the elicitation of which was not reversible error.

F. THE TRIAL COURT PROPERLY ADMITTED TESTIMONY AND EXHIBITS CONCERNING MONEY SPENT SUBSEQUENTLY TO THE ROBBERY

It is apparently the contention of appellant that his admission to Agent Plevack of his unemployment and lack of funds before the robbery should be stricken for reasons just discussed in Argument, E, supra. Even if this evidence were to go out, there remains in the record sufficient evidence from which the jury could have inferred that appellant was in a precarious economic state. He testified that his employment was intermittent - "I used to bird dog on the freight docks . . ." [R. T. 493] - and that the rest of his income came from gambling, a notoriously unreliable source of funds [R. T. 494].

The fact of appellant's impecunious status prior to the robbery, however it may be considered to have been established, makes admissible the evidence of sums spent afterward. This rule is stated in the two federal cases cited by appellant which have factual situations similar to the present one.

Gill v. United States, 285 F. 2d 711, 713 (5 Cir. 1961);

Self v. United States, 249 F. 2d 32, 34-35 (5 Cir. 1957);

See also: 1 Wigmore, Evidence, §154 (3rd ed., 1940)

Appellant is at pains to point out that a mere $611.50 is shown to have been spent out of a probable $3000 as his share of

the loot (although it might be inferred that appellant lost the balance gambling). By such argument appellant demonstrates the same confused reasoning castigated by Professor Wigmore in criticising the old Supreme Court case of Williams v. United States, 168 U.S. 382, 396-397 (1897) and, implicitly, other cases cited by appellant. The confusion is in thinking that because certain evidence, such as appellant's expenditure of comparatively large sums, standing alone, does not establish a presumption of guilt sufficient to convict, such evidence is therefore inadmissible. Certainly the test of relevancy is not whether certain evidence alone would carry the day for the Government, but whether it adds another facet to the picture presented to the jury.

G. THE TRIAL COURT PROPERLY REFUSED TO STRIKE THE RE-DIRECT TESTIMONY OF ERMA JEAN BENNETT.

The cross-examination of Erma Jean Bennett by appellant's counsel elicited a physical description of an apartment which she had rented to appellant after the robbery. She testified on re-direct that defendant Mason also tried to rent an apartment at the same time [R. T. 260-261]. A motion by Mason's counsel to strike the testimony on re-direct was denied. It is difficult to see how her amplification of the circumstances can be considered to have gone beyond the scope of cross-examination.

Even if it were true that the testimony in fact went

beyond the scope of cross-examination, in no case cited by appellant, nor in any found by appellee, has this fact alone resulted in reversal. As pointed out by Professor Wigmore, the reason for the so-called rule is to avoid production of new evidence after the opponent may have dismissed witnesses necessary for rebuttal. If this does not occur, then any irregularity in the order of evidence, the control of which is in the discretion of the trial court, is harmless.

6 Wigmore, Evidence, §1896 (3rd Ed., 1940);

Kuhn v. United States, 24 F. 2d 910, 914 (9 Cir. 1928);

Bracey v. United States, 142 F. 2d 85 (D. C. Cir. 1944).

Such testimony, being relevant, could have been brought out on direct examination and thus it is hardly prejudicial to appellant that it should have come out on re-direct examination. Certainly neither appellant nor Mason denied knowing the other when they took the stand. To analogize to the point made by appellee in Argument F, supra, the fact that the two men were together after the robbery may not have sufficed to convict them, but it was at least another fact for the jury to have considered.

H. THE FACT THAT A WITNESS CONSULTED WITH AN F. B. I. AGENT DURING THE TRIAL DOES NOT AMOUNT TO ERROR

It appears that during a recess a Government witness, Shirley Ratliff, asked Agent Plevack whether or not she had in fact reported a certain observation as to defendant Mason. In view of the fact that the jury were apprised of the interchange it is frivolous to suppose that any rights of defendant Mason were affected, much less those of appellant. Nor has appellant purported to even suggest wherein such consultation was "improper" or what "error" on the part of the trial court occurred.

I. THE RECORD DOES NOT DISCLOSE ANY REMARKS OF A PREJUDICIAL AND INFLAMMATORY NATURE.

At one point in the trial it became apparent that the testimony of Erma Jean Bennett, an apartment manager, would perhaps disclose that appellant, a Negro, had been living with a caucasian woman. The trial judge, in an effort to avoid any possible prejudice which might have arisen from a showing of a miscegenous relationship, immediately terminated inquiry on that point. What more could the court have done to protect appellant?

As for the remark that appellant and Mason were "both Negroes and black" [R. T. 556] it is obvious from the context that this was said as a point of comment on the crucial question

of identification and that to construe it a racial slur verges on insult of the trial judge.

A passage from the opinion in Smith v. United States, supra, is appropriate to the question here as well as those raised elsewhere by appellant:

> "A federal trial judge ... is more than a moderator or umpire. He has the responsibility to preside in such a way as to promote a fair and expeditious development of the facts unencumbered by irrelevancies. He may assist the jury by commenting on the evidence ..., providing the comment is fair and the jury is clearly instructed that they are to find the facts and may disregard such comment.
>
> In fulfilling this responsibility during the stress of a criminal trial, few, if any judges can altogether avoid words or action, inadvertent or otherwise, which seem inappropriate when later examined in the calm cloisters of the appellate court. But unless such misadventures so persistently pervade the trial or, considered individually or together, are of such magnitude that a courtroom climate unfair to the defendant is discernible from the cold record, the defendant is not sufficiently aggrieved to warrant a new trial."

Any claim of error on this point is ill-taken and spurious.

J. THE SUPPLEMENTAL INSTRUCTION GIVEN BY THE TRIAL COURT UPON THE FAILURE OF THE JURY TO SEASONABLY AGREE WAS ENTIRELY PROPER

The instruction complained of was excerpted almost entirely from 27 F. R. D. 39, No. 8.19, which was used and approved in the dramatic capital case of United States v. Kawakita, 96 F. Supp. 824, 825-827 (D. C. Cal. 1950), aff'd. 190 F. 2d 506 (9 Cir. 1951) aff'd. 190 U. S. 717 (1952). This "Allen Instruction" is considered a classic utterance of its kind, and can no more be held to have prejudiced rights of appellant than those of the notorious traitor Kawakita. In addition, there having been no objection raised at the trial, the question is not properly before this court.

K. THE CUMULATIVE EFFECT OF THE ENTIRE RECORD IS THAT APPELLANT RECEIVED A FAIR AND JUST TRIAL.

We again invite the court to consider the excerpted quotation from Smith v. United States, supra.

Not only does the record show an absence of any particular instance of prejudicial error but the cumulative effect of the court's supervision of the trial shows, if anything, a

benignity towards the defendants. The court refused to let the question of armed robbery under Section 2113(d) of Title 18, U. S. C. be considered, it forbade any testimony about a blonde "wife", and it manifested skepticism about the identification of the defendants as the robbers.

Short of a directed verdict of acquittal, appellant could not have been better treated by the court.

CONCLUSION

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Mark L. Dees

MARK L. DEES